IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 21, 2007

JERRY C. HARLAN v. CAROL L. SOLOMAN

Appeal from the Chancery Court for Williamson County
No. 31467 R.E. Lee Davies, Chancellor

No. M2006-01419-COA-R3-CV - Filed December 26, 2007

This is an action filed by both Appellant Harlan and Appellee Soloman for the sale for division of real property. The property was sold and all liens and costs associated with the sale were paid out of the proceeds. The remaining funds were distributed to Harlan and Soloman in proportion to their ownership interest. The trial court also required Harlan to bear his proportional share of the losses and denied his request to receive his proportional share of the fair market rental value of the property. Harlan appeals claiming that he is entitled to 16.79% of the net proceeds of the sale (his proportional share) prior to a deduction for the payment of Soloman's mortgage, that he should not be responsible for a pro rata share of the losses, and that he should be paid for the fair market rental value of his interest. We reverse the trial court on the first issue and affirm on the second and third issues.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Reversed in part, Affirmed in part and Remanded

ANDY D. BENNETT, J., delivered the opinion of the court,, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Gregory H. Oakley, Nashville, Tennessee, for the appellant, Jerry C. Harlan.

David Scott Parsley, Nashville, Tennessee, for the appellee, Carol L. Soloman.

OPINION

Pursuant to a prior court order, Appellant Jerry C. Harlan and Appellee Carol Soloman owned rental property at 816, 818 and 820 East Old Hickory Boulevard, Nashville, Tennessee as tenants in common. Harlan owned 16.79%, for which he paid cash. Soloman owned 83.21%, for which she took out a mortgage in her name. Soloman was granted sole possession of the property on May 15, 2001.

On April 19, 2005 Harlan and Soloman filed a joint petition to sell the property pursuant to Tenn. Code Ann. § 29-27-201. An agreed order was entered on May 13, 2005 allowing the property to be sold by the Clerk and Master. The order indicated certain expenses the Clerk and Master could

incur and also stated: "It is further ORDERED that the proceeds of the sale shall be disbursed pursuant to orders of the court after all valid liens and costs of the sale have been satisfied." The Clerk and Master filed a report on March 23, 2006 indicating that the three parcels of property had been sold at public auction; sale amounts were $70,000 for 816 Old Hickory Blvd., $105,000 for 818 Old Hickory Blvd., and $136,000 for 820 Old Hickory Blvd. On April 3, 2006 the trial court approved the sale and authorized the Clerk and Master "to receive from the closing the balance of funds after payment of sale, advertising, survey and closing expenses. The Clerk and Master shall disburse the remaining funds as ordered by the Court." The Clerk and Master used part of the proceeds to pay off the lien on the house arising from Soloman's mortgage.

On April 17, 2006, Soloman filed a motion requesting that the trial court deduct from the proceeds due Harlan his share of the losses arising from the rental of the property from 2000 until the property was sold, along with her attorney's fees and costs. Ten days later Harlan filed a motion seeking to receive 16.79% of the fair market rental value of the property from May 15, 2001 to the date of sale, as well as 16.79% of the net sale amount.

The trial court held a hearing on May 31, 2006. The court did not doubt the validity of the exhibits submitted by Soloman regarding expenses and income related to the property and determined that the parties should share in the losses experienced in proportion to their ownership interest. The court ordered the funds on deposit to be divided in accordance with the parties' ownership interest. Losses attributable to Harlan's 16.79% ownership totaled $7,018.93. These losses were deducted from Harlan's share and paid to Soloman. Previously assessed court costs were to be deducted from each party's share and any remaining costs were to be paid in the proportion of ownership.

Harlan appeals, claiming that he is entitled to 16.79% of the net proceeds of the sale prior to a deduction for the payment of Soloman's mortgage, that he should not be responsible for a pro rata share of the losses, and that he should be paid for the fair market rental value of his interest.

CALCULATION OF AMOUNT TO BE DIVIDED

Harlan claims he is entitled to 16.79% of the net proceeds of the sale prior to a deduction for the payment of Soloman's mortgage. In other words, he claims the deduction for Soloman's mortgage should come entirely from Soloman's share. He contends that Tenn. Code Ann. § 29-27-209(b) supports this position. Tenn. Code Ann. § 29-27-209(b) states:

> If it appears by the report that there are any existing encumbrances upon the estate or interest in the premises of any party named in the proceedings, the court may direct the same to be paid out of the share of the party in the funds, or order a credit to be given the purchaser for the amount of such encumbrance.

Soloman replies that Harlan agreed to the trial court's distribution of the sale proceeds through the following language in the agreed order of May 13, 2005: "the proceeds of the sale shall be disbursed pursuant to orders of the court after all valid liens and costs of the sale have been satisfied." She further maintains that Harlan asked the trial court for his pro rata share of the "net sale price," which he got.

The application of a statute is a question of law, which is reviewed de novo with no presumption of correctness. *Memphis Pub. Co. v. Cherokee Children and Family Servs.*, 87 S.W.3d 67, 74 (Tenn. 2002). Statutes should be interpreted in accordance with the natural and ordinary meaning of their language. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). "When the statutory language is clear and unambiguous, we must apply its plain meaning in its normal and accepted use, without a forced interpretation that would limit or expand the statute's application." *Id.* Tenn. Code Ann. § 29-27-209(b) is quite clear. While the word 'may' is normally construed as permissive, *Colella v. Whitt*, 308 S.W.2d 369, 371 (Tenn. 1957), that permissiveness only extends to choosing between two alternatives. Thus, when encumbrances on the interest of any party exist on land being sold pursuant to partition, the court either directs the encumbrance be paid out of that party's share or orders a credit for the purchaser. Under the statutory scheme, the encumbrance has no effect on other "unencumbered" parties to the action. Tenn. Code Ann. § 29-27-211.[1]

The language of the May 13, 2005 agreed order merely provides that liens will be paid without any delay awaiting a distribution by the court. Given that the trial court approved the sale April 3, 2006 and directed the Clerk and Master to deliver a fee simple deed, the trial court must have understood that this required paying off any existing lien. The agreed order does not say how the remaining funds are to be distributed. It certainly does not, and could not, give the trial court carte blanche to ignore Tenn. Code Ann. § 29-27-209(b) and divide the proceeds as it pleased. We also disagree with Soloman's view that by asking for his pro rata share of the "net sale price," Harlan somehow agreed that the trial court could deduct the amount of Soloman's lien from the proceeds before dividing the funds proportionately between Soloman and Harlan.

In light of Tenn. Code Ann. § 29-27-209(b), we hold that the trial court erred in deducting Soloman's lien amount from the sale amount and then distributing the remainder to the parties pro rata. The lien amount should have been deducted from Soloman's share alone.

ASSESSMENT OF LOSSES AND FAIR MARKET RENTAL VALUE

Harlan maintains that he should not be assessed a pro rata share of the losses arising from the property and, furthermore, should receive his pro rata share of the fair market rental value of the property for the time Soloman had sole possession. Soloman maintains that Harlan failed to file a transcript or statement of the evidence and should therefore be barred from challenging factual findings of the trial court. Harlan counters that the issues he raises are legal issues and that the documentary contents of the record are sufficient for an appellate determination.

Harlan's brief undercuts his argument that the documentary contents of the record are sufficient for our review. He maintains that Soloman included her mortgage payments in the expenses of the property and that, if these are deducted (because she alone is responsible for them), the property actually made a profit each year. The exhibit regarding profit and loss is not so clear. Losses are listed for the years 2000 through 2005, yet specific breakdowns of expenses are given

[1] Tenn. Code Ann. § 29-27-211 states: "The proceedings to ascertain and settle the amount of encumbrances, as provided in §§ 29-27-209–29-27-213, shall not affect any other party in the suit or delay the paying over or investing of moneys to or for the benefit of any party upon whose estate in the premises there appears to be no encumbrance."

only for the years 2001, 2004 and 2005. The 2001 expenses reference a "property note." The 2004 expenses reference "bank loan" and "bank loans." The 2005 expenses reference "bank." In the absence of a transcript or statement of the evidence, this Court can only speculate as to the purpose of these payments and as to the existence of mortgage payments in the years in which the expenses are not broken down. This we decline to do. An appellate court is a court of evaluation, not speculation. On this record, we cannot properly evaluate the documentary evidence.

> The appellant bears the primary burden of preparing a fair, accurate, and complete record on appeal, and the appellee shares some responsibility for ensuring that the record is adequate. *See Jennings v. Sewell-Allen Piggly Wiggly,* 173 S.W.3d 710, 713 (Tenn. 2005); *Syacha v. Waldens Creek Saddle Club,* 60 S.W.3d 851, 855 (Tenn. Ct. App. 2001). Ordinarily, "[a]n appellant who elects not to file either a transcript or a statement of the evidence will be faced with the practically insurmountable presumption that the record contained sufficient evidence to support the trial court's decision." *Savage v. Hildenbrandt,* 2001 WL 1013056 No. M1999-00630-COA-R3-CV, 2001 WL 1013056, at *6 (Tenn. Ct. App. Sept. 6, 2001). In the absence of a transcript or a statement of the evidence, we ordinarily presume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's decision. *Tallent v. Cates,* 45 S.W.3d 556, 562 (Tenn. Ct. App. 2000), *Jackson v. Jackson,* 2006 WL 1381604 (Tenn. Ct. App. May 16, 2006). Further, "it has long been the law of this State that where the trial court heard proof and the proof is not brought before the appellate court, it is conclusively presumed that there was evidence presented to support the trial court's findings and decree." *Harbour v. Brown,* 1986 WL 6848 (Tenn. Ct. App. June 20, 1986).

Riddle v. Riddle, 2007 WL 1094133, *3-4 (Tenn. Ct. App. April 11, 2007). The incomplete appellate record prevents this Court from engaging in further analysis of the trial court's decision. We therefore affirm the trial court's ruling which requires Harlan to pay a pro rata share of the losses arising from the property and denies Harlan a pro rata share of the fair market rental value of the property.

We reverse the trial court's decision regarding the calculation of the amount to be divided and affirm the trial court as to the assessment of losses and fair market rental value.
The case is remanded for further proceedings consistent with this opinion.

Costs of appeal are assessed against each party equally, for which execution may issue, if necessary.

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ANDY D. BENNETT, JUDGE